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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VLADIMIR BENITEZ, Defendant and Appellant.	G041824 (Super. Ct. No. 06ZF0129) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

Vladimir Benitez appeals from a judgment after a jury convicted him of murder and found true he personally used a deadly weapon, a knife. He argues the trial court erroneously instructed the jury on murder, manslaughter, and insanity. None of his contentions have merit, and we affirm the judgment.

FACTS

Eugenia Torijano rented space in her Huntington Beach apartment to Benitez and Enrique Martinez, who both slept in the living room.[1] Benitez and Martinez initially had a good relationship, but it began to sour in October 2005, when Martinez called Benitez a homosexual. Torijano told Benitez to move out by the end of the month, and Benitez was upset.

On Halloween morning, Benitez left the apartment to visit a family friend. Benitez told the friend he had a "problem" and he had no money, and asked for the cost of a plane ticket to Mexico.

Later that evening, Benitez entered the dark apartment while everyone was sleeping. Benitez stabbed Martinez multiple times and fled. Martinez cried for help, and Torijano looked through the window and saw a man wearing a jacket that looked like Benitez's jacket. Torijano and others found Martinez in a pool of blood. Martinez later died from 15 stab wounds.

Law enforcement officers arrived and investigated. They collected blood samples and observed a knife drawer in the kitchen was open. Outside, they found a bloody knife and bloody Nike jacket. DNA tests later revealed the blood on the Nike jacket and knife matched both Benitez and Martinez.

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[1] Torijano rented space to others who are not necessary characters in this appeal.

Law enforcement officers arrested Benitez three weeks later in Los Angeles County and advised him of his *Miranda*[2] rights. During the car ride back to Huntington Beach, officers interviewed Benitez, who said that when he went to the apartment on Halloween, Martinez was sleeping on the floor in the living room. Benitez said Martinez, who had a knife nearby, called him a homosexual, and Benitez grabbed the knife before Martinez grabbed it. Benitez admitted stabbing Martinez five times before leaving and disposing of the knife. Benitez accused Torijano of using witchcraft by taking his underwear and putting a spell on him.

At the police station, officers again interviewed Benitez. Benitez explained he got angry when Martinez called him a homosexual and exposed his penis to Benitez. Benitez stated he went to the kitchen, armed himself with a knife from the drawer, and stabbed Martinez. Benitez said he killed Martinez because Martinez insulted him. Later, he denied stabbing Martinez. Benitez added he was hearing voices and Torijano told him to kill Martinez.

The indictment charged Benitez with murder (Pen. Code, § 187, subd. (a))[3] and alleged he personally used a deadly weapon, a knife (§ 12022, subdivision (b)(1)). Benitez initially pled not guilty but changed his plea to not guilty by reason of insanity.

At trial, Benitez offered the testimony of two family members, who testified he was acting strangely before the murder. One of the family members, a cousin, testified Benitez told her that his landlady, Torijano, used witchcraft on him.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] All further statutory references are to the Penal Code, unless otherwise indicated.

Benitez testified, at times inconsistently, on his own behalf. Benitez stated he returned to the apartment Halloween evening just before midnight to use the restroom. He said the apartment was dark and Martinez was lying down in the living room. Initially, Benitez explained Martinez kicked him out of the apartment and Benitez returned, but later he said he only entered once. Benitez stated he saw a knife on the couch. He said Martinez called him a "faggot" and a "whore." Initially, Benitez said he grabbed the knife before Martinez grabbed it. Later Benitez stated Martinez, with knife in hand, provoked him, and Benitez wrestled the knife away from him. Benitez first claimed he took the knife outside the apartment but later said he left it inside. Benitez initially claimed he did not stab Martinez but then admitted he did, although he did not know whether he injured Martinez. He denied wearing the Nike jacket. Benitez claimed Torijano was using witchcraft on him.

Benitez also offered the testimony of a forensic psychologist, Dr. Roberto Flores de Apodaca (Flores). Flores evaluated Benitez and was of the opinion he was not malingering. He opined Benitez had a psychotic disorder with paranoid delusions. He explained people who are paranoid are violent and often have fears associated with homosexuality. Flores could not identify the exact cause of Benitez's condition but believed it was likely methamphetamine-induced paranoia.

The jury convicted Benitez of first degree murder and found true he personally used a knife. At the sanity phase of the trial, Flores again testified for the defense.

Flores opined Benitez had a psychotic disorder likely caused by substance abuse and he had the following delusions: (1) Torijano put him under a spell; (2) people accused him of a being a homosexual; (3) Torijano stole his underwear to put a spell on him and publicize his homosexuality; (4) Torijano offered her daughter to Benitez; and (5) Martinez exposed himself to Benitez and called him derogatory names. Flores

explained Benitez knew right from wrong, but he did not understand the nature and quality of his actions. Flores opined Benitez did not have a rational reason for committing the offense, but he committed the offense under a paranoid, delusional state, and, therefore, did not understand the nature and quality of his act.

The prosecutor offered the testimony of Kaushal Sharma, a psychiatrist. Sharma testified it was possible Benitez had a mental disease, but there was not enough evidence to diagnose him. Based on this inconclusive evidence on his sanity, and the nature of the offense, Sharma opined Benitez knew right from wrong and knew the nature and quality of his actions. Sharma believed Benitez sane at the time of the offense.

The jury found Benitez was legally sane at the time of the offense. The trial court sentenced him to 26 years to life in prison.

DISCUSSION

I. CALCRIM Nos. 520 & 521

Benitez argues CALCRIM Nos. 520, "Murder with Malice Aforethought," and 521, "Murder: Degrees," are legally erroneous because they blur the distinction between first and second degree murder. We disagree.

Preliminarily, Benitez did not object to the trial court instructing the jury with CALCRIM Nos. 520 and 521. However, we may review the legal correctness of a jury instruction if the defendant's substantial rights were affected. (§ 1259.) We therefore address Benitez's arguments and review the jury instruction de novo to determine whether they accurately stated the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 252.)

The trial court instructed the jury with CALCRIM No. 520 in relevant part as follows: "The defendant is charged in [c]ount 1 with murder in violation of . . . section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] 2. When the defendant acted, he had a state of mind called malice aforethought [¶] AND [¶] 3. He killed without lawful justification. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time."

The trial court also instructed the jury with CALCRIM No. 521 as follows: "If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and

premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Benitez claims CALCRIM No. 521's definitions of "willful, deliberate, and premeditated" erroneously required the jury to convict him of first degree murder upon a finding he formed an intent to kill before killing Martinez, and thus, "there was no way for the jury to reach a verdict of guilt on intentional second degree murder." He adds "[t]he 'plain language' employed in CALCRIM [Nos.] 520 and 521 renders indistinguishable (1) express malice and willful action; (2) malice aforethought and premeditation; and (3) implied malice and deliberation." Neither of his contentions have merit.

As relevant to the issue here, CALCRIM No. 520 instructed the jury that to convict him of murder, it had to find he acted with malice aforethought and there were two kinds of malice aforethought, express malice and implied malice. The instruction then explained that to find one of the kinds of malice aforethought, express malice, the jury had to conclude "he unlawfully intended to kill." CALCRIM No. 521 required the jury to determine whether he was guilty of first or second degree murder. The instruction stated that to convict him of first degree murder, the jury had to be convinced beyond a reasonable doubt, Benitez acted willfully, deliberately, and with premeditation. The instruction defined those terms. Thus to convict Benitez of first degree murder, the jury had to conclude beyond a reasonable doubt he intended to kill Martinez, carefully

weighed the considerations for and against his choice and, knowing the consequences, decided to kill him, and decided to kill him before committing the act that caused his death (stabbing him).

Additionally, CALCRIM No. 521 expressly stated: "A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." Thus, Benitez's claim deliberation and premeditation were identical to the unlawful intent to kill is unpersuasive. Moreover, CALCRIM No. 521 instructed the jury that if the prosecutor did not prove beyond a reasonable doubt Benitez acted 'willfully, deliberately, and with premeditation it must find the defendant not guilty of first degree murder. Therefore, his argument CALCRIM No. 521 permitted the jury to find him guilty of first degree murder by simply concluding he formed the intent to kill before killing Martinez, without more, is meritless.

Furthermore, CALCRIM No. 521 is consistent with its counterpart CALJIC No. 8.20. The California Supreme Court has held CALJIC No. 8.20 contains a correct statement of the law. (*People v. Millwee* (1998) 18 Cal.4th 96, 135, fn. 13 [CALJIC No. 8.20 is a correct statement of the law]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1021 ["The trial court had correctly defined a deliberate and premeditated murder by giving CALJIC No. 8.20"].) Therefore, the trial court properly instructed the jury with CALCRIM Nos. 521 and 520.[4]

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[4] We note this is the third time appellate counsel has been unsuccessful with this argument in this division. In one of those nonpublished cases, *People v. Dawes* (Feb. 25, 2010, G041340), another panel of this court noted defendant in making this argument relied on the fact the jury requested clarification on the difference between first and second degree murder.

This must explain why in the briefs in this case, appellate counsel states, "[t]hese over-simplified [*sic*] instructions have thereby eliminated any distinction between first and second degree murder, an error expressly recognized by this jury on the record and not remedied by the court's response to their request for clarification." The jury did not request clarification of these instructions in *this* case, and therefore, this issue

To the extent Benitez suggests the prosecutor committed misconduct when discussing these instructions, his claim is not supported by authority and reasoned analysis, and therefore we need not address it. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Finally, the trial court instructed the jury that if anything the attorneys stated during argument conflicted with the jury instructions, the jury must follow the instructions (CALCRIM No. 200). "'We presume that jurors understand and follow the court's instructions' [citation]. . . ." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005 (*Hovarter*).)

II. CALCRIM No. 570

Benitez contends the CALCRIM instructions failed to adequately inform the jury that to convict him of murder, the prosecutor had to prove beyond a reasonable doubt the absence of provocation and heat of passion. We disagree.

Although again Benitez did not object to this instruction and request clarification, the legal correctness of the instructions affects his substantial rights, and we will therefore review the instructions in their entirety to determine whether they accurately stated the law. Absence of a sudden quarrel or heat of passion is a fact the prosecution must prove beyond a reasonable doubt when murder and voluntary manslaughter are under joint consideration. (*People v. Rios* (2000) 23 Cal.4th 450, 454, 462 (*Rios*).)

CALCRIM No. 570, "Voluntary Manslaughter: Heat of Passion—Lesser Included Offense," provided: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of the intense emotion

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is not before us. We assume appellate counsel simply forgot to omit this language when preparing the brief here.

that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts. [¶] If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] *The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion.* If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

Benitez asserts a jury deliberating the charges in the order of the instructions would first consider the greater crime of murder and if the jury agreed he was guilty of murder it would not proceed to consider an absence of provocation or heat of passion. Based on the entire charge, we conclude his claim is meritless.

CALCRIM No. 570 stated in relevant part: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion." We note the California Supreme Court held

CALCRIM No. 570's predecessor, CALJIC No. 8.50, adequately conveyed the prosecution's burden on this element. (*Rios, supra,* 23 Cal.4th at p. 462.) The court also instructed the jury that when the court tells the jury the prosecutor must prove something, then it must be beyond a reasonable doubt (CALCRIM No. 220).

The trial court read these, and all the instructions, to the jury before deliberations. The jury therefore heard the instruction on the prosecution's burden of proving absence of sudden quarrel or heat of passion before retiring to deliberate. The court also advised the jury to to pay careful attention to the instructions and consider them together (CALCRIM No. 200). (*People v. Najera* (2006) 138 Cal.App.4th 212, 228 [trial court read instructions to jury in their entirety before deliberations and heard requirement prosecutor must prove absence of provocation and heat of passion].) And the jury had a copy of the instructions while deliberating. We presume the jury understood and followed the trial court's instructions. (*Hovarter, supra,* 44 Cal.4th at p. 1005.) Based on the entire charge, we conclude the jury instructions correctly stated the law and the jury was properly apprised of the prosecution's burden of proof before convicting Benitez of murder.

III. CALCRIM No. 3450

Benitez claims CALCRIM No. 3450 does not accurately state the substance abuse limitation on the insanity defense set forth in section 25.5 because it requires a defendant to prove more than one mental illness or defect. Not so.

Section 25.5 provides in pertinent part: "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances."

CALCRIM No. 3450, "Insanity: Determination, Effect of Verdict," stated: "You have found the defendant guilty of murder in the first degree. Now you must decide whether he was legally insane when he committed the crime. [¶] The defendant

must prove that it is more likely than not that he was legally insane when he committed the crime. [¶] The defendant was legally insane if: [¶] 1. When he committed the crime, he had a mental disease or defect; [¶] AND [¶] 2. Because of that disease or defect, he did not know or understand the nature and quality of his act or did not know or understand that his act was morally or legally wrong. [¶] None of the following qualify as a mental disease or defect for purposes of an insanity defense: personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts. [¶] Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity. [¶] *If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity*. A settled mental disease or defect is one that remains after the effect of the drugs or intoxicants has worn off. [¶] You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime. If you are satisfied that he had a mental disease or defect before he committed the crime, you may conclude that he suffered from that same condition when he committed the crime. You must still decide whether that mental disease or defect constitutes legal insanity. [¶] If you find the defendant was legally insane at the time of his crime, he will not be released from custody until a court finds he qualifies for release under California law. Until that time he will remain in a mental hospital or outpatient treatment program, if appropriate. He may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for his crime. If the state requests additional confinement beyond the maximum

sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime. You must not speculate as to whether he is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way. [¶] If you conclude that at times the defendant was legally sane and at other times the defendant was legally insane, you must assume that he was legally sane when he committed the crime. [¶] If you conclude that the defendant was legally sane at the time he committed the crime, then it is no defense that he committed the crime as a result of an uncontrollable or irresistible impulse. [¶] If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that he was legally insane when he committed the crime, you must return a verdict of not guilty by reason of insanity." (Italics added.)

In *People v. Cabonce* (2009) 169 Cal.App.4th 1421, 1433-1435, a case where the trial court first instructed the jury with CALJIC Nos. 4.00, "The Defense of Insanity," and 4.02, "Insanity Resulting from Intoxication, Drugs, or Narcotics" and then the portion of CALCRIM No. 3450 at issue here, the *Cabonce* court explained section 25.5 "has been interpreted to establish 'an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the *sole* basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off.' [Citation.]"

Thus, section 25.5 prohibits one's voluntary ingestion of intoxicants as the sole basis for an insanity defense. CALCRIM No. 3450, like CALJIC Nos. 4.00 and 4.02 before it, instructs the jury accordingly. CALCRIM No. 3450 clearly states: "Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, *by itself*, does not qualify as legal insanity." (Italics added.) The instruction later explains though that the jury "may consider any evidence that the

defendant had a mental disease or defect before the commission of the crime." Thus, CALCRIM No. 3450 does not require a defendant prove more than one mental illness or defect.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.